Consideration of objections and other pleadings with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Locust Street Company, Inc., v. Citation Oil & Gas Corp. and Department of Natural Resources*, Administrative Cause Nos. 13-101G and 13-104G:

- Findings of Fact and Conclusions of Law with Nonfinal Order, dated June 27, 2014
- Claimant's Objection to Findings of Fact and Conclusions of Law with Nonfinal Order on Motion for Summary Judgement, filed July 14, 2014
- Submission of Possible Revision for Consideration by the AOPA Committee of the Natural Resources Commission, dated July 22, 2014
- Response to Claimant's Objection to Findings of Fact and Conclusions of Law with Nonfinal Order on Motion for Summary Judgment, filed August 22, 2014

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

LOCUST STREET COMPANY, INC.	)	**Administrative Cause**
Claimant,	)	**Number: 13-101G**
	)	
vs.	)	
	)	
CITATION OIL & GAS CORP., and	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**Permit # 54797**
Respondents.	)	
	)	

IN THE MATTER OF:

LOCUST STREET COMPANY, INC.	)	**Administrative Cause**
Claimant,	)	**Number: 13-104G**
	)	
vs.	)	
	)	
CITATION OIL & GAS CORP., and	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**Permit # 54796**
Respondents.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NONFINAL ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Background and Jurisdiction

1. On June 5, 2013, the Claimant, Locust Street Company, Inc. *("Locust Street")*, filed its petition for administrative review with the Natural Resources Commission *("Commission")* alleging to be aggrieved or adversely affected by the Respondent, Department of Natural Resources' *("Department")*, issuance of two Oil Well Drilling and Operating Permits to the Respondent, Citation Oil and Gas Corporation *("Citation")*.

2. Permit 54796 and Permit 54797 *(hereinafter referred to collectively as "the Permits")* were issued by the Department on May 22, 2013 and are the subject of administrative review under administrative cause number 13-104G and 13-101G, respectively.
3. Locust Street asserts that it is the agent for and manager of certain Gray family entities that have held "complete title to certain real estate in Wabash County, Illinois located along the border of Illinois and Indiana, opposite Gibson County", Indiana since "circa 1839."
4. Citation holds a lease *(the Amanta Maier Lease)*, dated July 12, 1937 and duly recorded on September 29, 1937, to drill for oil and gas on lands within a drilling unit located "east of the Wabash River and within Section 14, Township 3 South, Range 14 West, lying [in] Gibson County, Indiana." Citation agrees that this property lies immediately across the Wabash River to the east of the property owned by the Gray family entities. *Brief in Support of Motion for Summary Judgment, pg.2.*
5. For consideration in this proceeding is Locust Street's opposition to Citation's assertion "that it owns or controls the rights to drill and produce oil in and under all lands within the drilling unit boundary and lease acreage..." With respect to Permit 54797 Locust Street elaborates as follows:

> 4. The drilling unit and lease acreage for this well are located near the present location of the Wabash River, which forms the boundary between Illinois and Indiana.
> 5. According to a recent presentation by the Indiana Society of Professional Land Surveyors entitled "State Line Retracement Issues with Special Emphasis on the PLSS and Riparian Closings on the Illinois/Indiana Boundary," which was held on April 18, 2013, in Vincennes Indiana, mineral rights are traced to the original fee simple patents granted by the U.S. Department of the Interior, Bureau of Land Management, General Land Office ("GLO").
> 6. Although the meanderings of the Wabash River since 1839 may have affected the Gray family entities' ownership of surface rights adjacent to the Wabash River, the oil and gas rights remain as they were held under the original GLO patents, unless such rights were subsequently transferred or conveyed by the owner.
> 7. Upon information and belief, the drilling unit for the Amanta Maier Well #30E that is the subject of the Permit [Permit 54797] encroaches upon mineral interests owned by Gray family entities and managed by Locust Street.

Petition Requesting an Administrative Review of Oil Well Permit #54797 Issued to Citation Oil & Gas Corp., Gibson County, Indiana, pg. 2. Locust Street offers the same position in its petition for administrative review associated with Permit 54796.

6. The Department, through its Division of Oil and Gas, is responsible for permitting, regulation, enforcement and other functions associated with the production of oil and gas in accordance with Indiana Code §§ 14-37 and 312 Indiana Administrative Code 16. *Indiana Code § 14-37-2-1.*
7. The Commission is the ultimate authority for the Department with respect to the instant proceeding. *Indiana Code § 4-21.5-1-15 and 312 IAC 3-1-2.*
8. On November 21, 2013, Citation filed its motion for summary judgment to which Locust Street and the Department filed timely responses on December 31, 2013. Citation's reply brief was filed on January 6, 2014 and oral argument was heard on January 23, 2014.

Summary Judgment Standard

9. Summary judgment in administrative proceedings is governed by Indiana Code § 4-21.5-3-23, which expressly reflects the applicability of Trial Rule 56 of the Indiana Rules of Trial Procedure.
10. Trial Rule 56 authorizes a party against whom a claim has been initiated, in this instance Citation and the Department, to seek summary judgment at any time following the commencement of the action.
11. "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Howard v. DNR and Smith,* 13 CADDNAR 36, 38 (2012) citing *Wells v. Hickman,* 657 N.E.2d 172, 175 (Ind. App. 1995).
12. "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Trial Rule 56(C),* See also *Rodgers v. Liston and DNR,* 13 CADDNAR 222, 223 (2014).
13. Summary judgment may be granted upon the issues raised by Citation in favor of another party although the other party did not file a similar motion for summary judgment. *Trial Rule 56(B),* see also *Wheeler, et al. v. Peabody, DNR and Town of Zionsville,* 9 CADDNAR 193 (2004).
14. "A fact is 'material' for summary judgment purposes if it helps to prove or disprove an essential element of the plaintiff's cause of action." *Rodgers v. Liston and DNR,* supra, citing *Graham v. Vasil Management Co., Inc.* 618 N.E.2d 1349 (Ind. App. 1993).

15. "A factual issue is 'genuine' for purposes of summary judgment if the trier of fact is required to resolve an opposing party's different versions of the underlying facts." *Rodgers v. Liston and DNR*, supra, citing *York v. Union Carbide Corp.*, 586 N.E.2d 861 (Ind. App. 1992).
16. "A party moving for summary judgment has the burden of proof with respect to summary judgment, regardless of whether the party would have the burden in an evidentiary hearing. Once the party moving for summary judgment establishes a lack of material fact, the party responding to the motion must disgorge sufficient facts to show the existence of a genuine triable issue." *Philbeck v. Collins & Altman*, 13 CADDNAR 219 (2013), (internal citations omitted).

Findings of Fact

17. While the exact boundaries of property owned by the Gray family entities and by Citations' lessor throughout the years is not stipulated by the parties, the evidence provided by each Locust Street and Citation is substantially consistent with respect to the property rights of each party and the location of the wells to be drilled under the authority of the Permits.
18. The Gray family entities are the owners of property situated in Illinois on the western shore of the Wabash River opposite the property owned by Citation's lessor located on the eastern shore of the Wabash River in Gibson County, Indiana.
19. The natural erosional forces associated with the Wabash River has, over time, caused a diminution of the surface property owned by the Gray family entities while the surface property owned by the lessor of Citation has experienced expansion through accretion. Compare *Petition Requesting Administrative Review of Oil Well Permit # 54796, Exhibit A, Brief in Support of Motion for Summary Judgment Exhibits C & G.*
20. The wells authorized by the Permits will be located within the surface property boundary of Citation's lessor on the Indiana side of the Wabash River although the location of the proposed wells was historically within the surface property boundary of the Gray family entities on the Illinois side of the Wabash River. *Brief in Support of Motion for Summary Judgment, Exhibit C.*

Conclusions of Law

21. It has been long settled that:

> "when grants of land border on running water, and the banks are changed by that gradual process known as 'accretion,' the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of

> his possessions may vary. In *New Orleans v. U.S.,* 10 Pet. 662, 717, this court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold be the same boundary, including the accumulated soil. No other fuel can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.

Nebraska v. Iowa, 143 U.S. 359, 360-361, (1892). See also *Mississippi v. Arkansas,* 415 U.S. 289 (1974; *Missouri v. Nebraska,* 196 U.S. 23 (1904); *Arkansas v. Tennessee,* 246 U.S. 158 (1918); *Longabaugh v. Johnson,* 321 N.E.2d 865, (Ind. Ct. App. 1975); *Town of Freedom v. Norris,* 27 N.E.2d 869, (Ind. 1891).

22. An exception to the principal of accretion is recognized where:

> if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course, and runs into one of the two neighboring states, the bed which is abandoned becomes, thenceforward, their boundary, and remains the property of the former owner of the river.

Id at 366-367.

23. The parties' filings and evidentiary material highlight the gradual and historic alterations of the Wabash River from 1806 to 2013 in the geographical area of interest. *Petition Requesting Administrative Review of Oil Well Permit # 54796, Exhibit A, Brief in Support of Motion for Summary Judgment Exhibits C, E, F & G.* The evidentiary material is void of evidence indicative of an avulsion resulting in a sudden and immediate change in course of the Wabash River.

24. Clearly the common law doctrine of accretion and erosion controls in Indiana with respect to surface property so impacted. *Longabaugh v. Johnson,* 321 N.E.2d 865, (Ind. Ct. App. 1975); *Town of Freedom v. Norris,* 27 N.E.2d 869, (Ind. 1891). The Commission has also routinely recognized common law associated with riparian rights in concluding that accretion and erosion by natural causes may alter the location of shorelines. *Sims, et al., supra & Lauder and Starke Co. Comm., supra.*

25. Locust Street seemingly accepts that the affect of accretion and erosion clearly control with respect to the Gray family entities and Citations' lessor's ownership of the surface property. The issue at hand involves no dispute that Citation's lessor in Indiana now owns title to a larger surface area as a result of accretion and the Gray family entities now owns a diminished surface property area in Illinois resulting from erosion.

26. However, while the impact of accretion upon surface property is not in dispute, the impact of accretion upon the ownership of the subsurface property interests is in dispute. Diligent search has failed to identify an occasion in which an Indiana court has considered the impact of accretion upon subsurface property interests.

27. It is not the intent of this decision to exactly establish the parties' respective property boundaries, whether those be surface or sub-surface boundaries. It is the intent, however, to establish whether Citation is a proper "owner" having the requisite authority to drill into and produce oil and gas from the particular pool in question for the purpose of affirming or overturning the issuance of the Permits. *See 312 IAC 16-1-39.*

28. Additional factors must be considered with respect to this proceeding. First is the State of Indiana's property interests associated with the geographic area at issue and second is the fact that Locust Street's contention brings into issue considerations potentially impacting the boundary line between the State of Indiana and the State of Illinois.

29. The Wabash River "from its junction with the Ohio River for 441.9 river miles to the Wells-Adams County Line" is a navigable waterway. *Information Bulletin #3 (Third Amendment) Roster of Indiana Waterways Declared Navigable or Nonnavigable*, June 11, 2008, http://www.in.gov/legislative/iac/20080611-IR-312080426NRA.xml.pdf.

30. Title to the bed of a navigable waterway vests in the State of Indiana. *State v. Kivett*, 95 N.E.2d 145, (1950), *Snyder v. Department of Natural Resources*, 8 CADDNAR 41 (1998).

31. The doctrine of accretion, clearly accepted in Indiana, dictates that the ownership of the bed of the Wabash River is vested regardless of any change in physical location.

32. Therefore, just as this analysis requires a determination as to the property interests of Locust Street and Citation's lessor in light of the meanderings of the Wabash River over time, the State of Indiana's property interests must also be considered.

33. Furthermore, it is noted that the State of Indiana's western boundary with Illinois is identified as:

> ... a line drawn along the middle of the Wabash from its mouth, to a point, where a due north line drawn from the town of Vincennes, would last touch the north western shore of the said river...

31 Acts Passed at the First Session of the Fourteenth Congress of the United States, 59-61; U.S. Statutes at Large, III, 289-291; Kettleborough (ed.), Constitution Making in Indiana, I, 73-77; Carter (ed.), Territorial Papers, VIII, 404-408.

34. The Department correctly notes that a determination of the boundary between the State of Indiana and the State of Illinois is a matter within the original and exclusive jurisdiction of the [United States Supreme] Court." *Ohio v. Kentucky*, 410 U.S. 641 (1973). The content of the instant order shall be restricted in application to the matter at hand and in no respect be viewed as commentary with respect to any determination of the location of the Indiana – Illinois State boundary.

35. The Supreme Court of Indiana has, on at least one occasion, considered the relationship between surface property and subterranean formations lying beneath that surface. In so doing the court stated:

> It will be noted that appellee nor his predecessors in title had never effected a severance of the cave from the surface estate. Therefore the title of the appellee **extends from the surface to the center**...

Marengo Cave Co. v. Ross, 10 N.E.2d 917 (1937), (emphasis added).

36. It is recognized that a cave is a fixed structure permanently located beneath the surface property more akin to coal reserves than to oil and gas, which has the ability to migrate from one location to another. Notwithstanding this difference,

> **Oil and gas are a part of the property under which they lie and for that reason are the property of the surface owner of the land** but they remain the property of the surface owner only for the time that they remain beneath that surface.

Williams v. DNR and Countrymark Energy, 13 CADDNAR 6, 11 (2012) relying upon *Brown v. Spilman,* 155 U.S. 665, 669-670, (1895) (emphasis added).

37. The Indiana Supreme Court's ruling in *Marengo Cave* establishes that title to surface lands carries with it title to subsurface formations and based upon United State Supreme Court pronouncement, the Commission has agreed that oil and gas reserves located beneath the surface are owned by the surface landowner. Seemingly there is no distinction to be made with respect to the type of subsurface formation that exists; the surface owner is the owner of whatever lies beneath.

38. *Marengo Cave* contemplates the ability to sever the subsurface property from the surface property consistent with Indiana Code §§ 32-23-10's establishment of the means by which subsurface mineral rights may be severed from the surface property to which they are attached.

39. To "sever" is "to separate (a part) from the whole" or to "divide into parts; disunite". *Dictionary.com Unabridged, Based on the Random House Dictionary, © Random House, Inc.*

2014, http://dictionary.reference.com/browse/sever?s=t . This further supports the conclusion that surface property and its subsurface components are routinely viewed to be one interest that is subject to separation.

40. Courts in numerous jurisdictions have concluded that the doctrine of accretion not only controls with respect to the surface property but also governs title to the subsurface property interests. *Swaim v. Stephens Production Company,* 196 S.W.3d 5, (Supreme Court of Arkansas, 2004); See also *Eli v. Briley,* 959 S.W.2d 723 (Tex.App.-Austin 1998), *Siegert v. Seneca Resources Corp.,* 28 S.W.3d 680 (Tex.App.-Corpus Christi 2000); *Nilsen v. Tenneco Oil Co.,* 614 P.2d 36 (Okla. 1980); *Jackson v. Burlington Northern, Inc. 667 P.2d 406 (1983)*
41. The deliberations and conclusions from other jurisdictions are instructive.
42. Indiana's application of the doctrine of accretion is consistent with a majority of jurisdictions and there is here no convincing rationale to support a divergence from the majority view that the doctrine of accretion is equally applicable to subsurface property interests.
43. The Indiana Supreme Court's prior determination that title to the surface of real property carries with it title "to the center" is consistent with the application of the doctrine of accretion to subsurface property interests. Through such application title to the surface and title to the subsurface remain unified absent severance by the title owner.
44. Application of the doctrine of accretion to the facts presented establish by a preponderance of the evidence that the wells proposed to be drilled under the authority of the Permits are located within property to which Citation's lessor holds title to both the surface and sub-surface
45. Citation presented many alternative theories in support of its motion for summary judgment including, adverse possession, estoppel by laches and acquiescence. Because this matter is determined on other grounds as stated herein, it is unnecessary to address the remainder of Citations' contentions.
46. In "Claimant's Response in Opposition to Citation Oil & Gas Corp.'s Motion for Summary Judgment", Locust Street raises a new issue, different than the issues presented in its petitions for administrative review[1]. The newly developed issue presented by Locust Street alleges that the "oil wells proposed by the Permits at issue in these cases ...are not on the acreage set forth in the Amanta Maier Lease or Maier Lease Assignment."

[1] Citation responded to the newly raised issue in its reply brief and offered no objection.

47. It has been previously determined that the wells authorized by the Permits are proposed to be located on property that through application of the doctrine of accretion is owned by Citation's lessor. Whether the lease between Citation and its lessor encompasses these accreted lands upon which the wells are to be drilled is a matter for consideration between Citation and its lessor.
48. Locust Street, who has failed to prove its claim to be the rightful owner of the oil and gas to be produced by the wells authorized by the Permits and who is not a party to the lease upon which Citation claims an interest in the oil and gas is not a proper party to contest the lease agreement between Citation and its lessor.
49. In any event, the lease was the subject of previous litigation by which the court concluded that all accreted lands were included in the lease whether or not specifically described. *Maier v. Continental Oil Co.*, 120 F.2d 237 (1941).

Nonfinal Order

50. The Permits issued by the Department of Natural Resources to Citation Oil & Gas Corp. are affirmed.

Dated: June 27, 2014

Sandra L. Jensen
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
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A copy of the foregoing was sent to the following:

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BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

IN THE MATTER OF:		
LOCUST STREET COMPANY, INC.,	)	**Administrative Cause**
Claimant,	)	**Numbers: 13-101G**
	)	
vs.	)	
	)	
CITATION OIL & GAS CORP., and,	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**Permit # 54797**
Respondents.	)	

IN THE MATTER OF:		
LOCUST STREET COMPANY, INC.,	)	**Administrative Cause**
Claimant,	)	**Numbers: 13-104G**
	)	
vs.	)	
	)	
CITATION OIL & GAS CORP., and,	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**Permit # 54796**
Respondents.	)	

CLAIMANT'S OBJECTION TO FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER ON MOTION FOR SUMMARY JUDGMENT

Comes now Claimant, Locust Street Company, Inc., ("Locust Street") by counsel, Kahn, Dees, Donovan & Kahn, LLP, pursuant to IC 4-21.5-3-29 and 312 IAC 3-1-12, and respectfully submits its Objection to the Findings of Fact and Conclusions of Law with Non-Final Order on Motion for Summary Judgment dated June 27, 2014, and in support thereof states as follows:

Procedural Background

1. This matter came before the Natural Resources Commission ("NRC") on two (2) separate Petitions Requesting Administrative Review of an Oil Well Drilling and Operating Permits #54796 and #54797 issued by the Indiana Department of Natural Resources ("IDNR"),

Division of Oil and Gas, to Citation Oil & Gas Corp. ("Citation") on May 22, 2013 (hereinafter, the "Permits").

2. The Permits granted to Citation the right to drill oil wells on certain property along and near the banks of the Wabash River, which forms the border between Gibson County, Indiana and Wabash County, Illinois.

3. Locust Street is the agent for and manager of certain Gray family entities that own certain fee simple real estate in Wabash County, Illinois along the course of the Wabash River opposite the location of Citation's proposed oil wells. Since at least as early as 1940, the Gray family entities have entered into continuous and uninterrupted leasing of their oil rights for production by various entities.

4. On November 21, 2013, Citation filed its Motion for Summary Judgment and Brief in Support seeking dismissal of Locust Street's requests for administrative review of the Permits.

5. On December 31, 2013, Locust Street filed its Response in Opposition to Citation's Motion for Summary Judgment, setting forth numerous Material Issues of Fact supported by citations to various exhibits submitted by Citation and Locust Street.

6. On January 6, 2014, Citation filed its Reply Brief in Support of Motion for Summary Judgment.

7. Oral argument on the Motion for Summary Judgment was held on January 23, 2014.

8. On June 27, 2014, the Administrative Law Judge assigned to this matter issued Findings of Fact and Conclusions of Law with Non-Final Order on Motion for Summary Judgment (the "Order").

9. Pursuant to IC 4-21.5-3-29 and 312 IAC 3-1-12, a party may file an objection to an order of an Administrative Law Judge, which objection shall be heard by a committee of the Natural Resources Commission.

Objection to Order

A. The Administrative Law Judge ignored undisputed factual evidence establishing a riparian boundary that is different than the current location of the Wabash River.

The Order issued by the Administrative Law Judge ("ALJ") is based entirely on the application of the common law doctrine of accretion as applied to the ownership of the oil and gas interests that are the subject of the Permits at issue in these cases. In the Conclusions of Law, the ALJ found that the doctrine of accretion has been applied in Indiana to issues of surface property rights. (Order, p. 5, ¶ 24). However, the ALJ appears to have disregarded an important exception to the doctrine of accretion "when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area." *Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940). Under the doctrine of prescription and acquiescence, it may be proved that one party has recognized through its actions a riparian boundary claimed by another party that is different than the current location of a river or body of water. *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926).

In ignoring this exception to the doctrine of accretion, the ALJ did not address the undisputed facts established by Locust Street that for nearly thirty (30) years IDNR has continued to assert state ownership of and receive royalty payments for oil produced from under Indiana's portion of the bed of the Wabash River as it existed in 1984 pursuant to a Unit Agreement entered into by IDNR and Citation's predecessor in interest. *Claimant's Response in Opposition to Citation Oil & Gas Corp.'s Motion for Summary Judgment, Exhibits 7 & 8.*

The ALJ's application of the doctrine of accretion to the mineral interests in this case would lead to the conclusion that IDNR has been receiving royalty payments for minerals which may no longer be under the Indiana portion of the bed of the Wabash River. Additionally, evidence that was not addressed by the ALJ would appear to show that IDNR may be receiving royalties for minerals that because of accretion are now under the Illinois portion of the bed of the Wabash River and other lands in Illinois. By asserting rights to minerals for a period in excess of twenty (20) years - "notwithstanding any subsequent shifts or changes in the course of the Wabash River" - IDNR and Citation, and its predecessor in interest, have created an exception to the doctrine of accretion based on the doctrine of prescription and acquiescence.

This long-continued and uninterrupted assertion of rights to mineral interests pursuant to the Unit Agreement shows that IDNR and Citation, and its predecessor in interest, have acquiesced in the establishment of a boundary for the mineral interests that is not the same as the current thalweg of the Wabash River. Evidence presented by Locust Street which establishes this acquiescence precludes the application of the doctrine of accretion proposed in the Order. Therefore, a genuine issue of material fact exists regarding the mineral rights claimed by Citation and the location of the boundary line for said mineral rights. Because of these genuine issues of material fact created by this evidence, Citation's motion for summary judgment should have been denied. Rather, the ALJ did not even address this exception to the doctrine of acquiescence in the Order.

Conclusion

Evidence presented by Locust Street shows IDNR and Citation, and its predecessor in interest, have operated for more than twenty (20) years under an agreement that established a mineral ownership boundary that ignores subsequent shifts or changes in the course of the

Wabash River due to accretion. It is unclear why the ALJ failed to address these factual and legal issues raised by Locust Street, but in so ignoring these issues, the Order incorrectly concluded that there were no genuine issues of fact and improperly granted summary judgment in favor of Citation. For these reasons, the Order should be dissolved and this case remanded back to the ALJ for further proceedings.

Dated: July 14, 2014

Respectfully submitted,

KAHN, DEES, DONOVAN & KAHN, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2014, a copy of this Objection to the Findings of Fact and Conclusions of Law with Non-Final Order on Motion for Summary Judgment was served upon the following by e-mail and by UPS delivery or U.S. First Class Mail:

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Michael R. DiRienzo

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

LOCUST STREET COMPANY, INC.	)	**Administrative Cause**
Claimant,	)	**Number: 13-101G**
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CITATION OIL & GAS CORP., and	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**Permit # 54797**
Respondents.	)	
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IN THE MATTER OF:

LOCUST STREET COMPANY, INC.	)	**Administrative Cause**
Claimant,	)	**Number: 13-104G**
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vs.	)	
	)	
CITATION OIL & GAS CORP., and	)	
DEPARTMENT OF NATURAL RESOURCES,	)	**Permit # 54796**
Respondents.	)	

SUBMISSION OF POSSIBLE REVISION FOR CONSIDERATION BY THE AOPA COMMITTEE OF THE NATURAL RESOURCES COMMISSION

On July 14, 2014, Claimant, Locust Street Company, Inc. *("Locust Street")*, filed objections to the "Findings of Fact and Conclusions of Law with Nonfinal Order on Motion for Summary Judgment" *("Nonfinal Order")* issued by the administrative law judge on June 27, 2014.

Locust Street's objection relates to the administrative law judge's failure to address its contention that Citation Oil and Gas Corp. *("Citation")* and the Department of Natural Resources *("Department")* had acquiesced to the establishment of a riparian boundary

different than the riparian boundary that would be established solely upon application of the doctrine of accretion. The administrative law judge having reviewed the Locust Street's objection and comparing the same to the issued Nonfinal Order concurs that the legal issue was not fully addressed. The administrative law judge observes that the Nonfinal Order includes a discussion of the Department's ownership of the bed of navigable waterways, including the Wabash River, at Findings 29 through 33, which set the stage to address the issue; however, the issue was not fully disposed.

For the reasons stated, the administrative law judge offers for consideration by the AOPA Committee the addition of the following findings to be inserted after Findings 44:

45. Locust Street asserts that notwithstanding a determination that the doctrine of accretion applies equally to the sub-surface properties as to surface properties, "the actions of the respondents [Citation and the Department] for the past thirty years establish a different mineral boundary" through acquiescence. *Claimant's Response in Opposition to Citation Oil & Gas Corp.'s Motion for Summary Judgment, pg 8.*

46. Locust Street finds support for its contention in the "Unit Agreement" entered into between the State of Indiana and Damson Oil Corporation, the predecessor in interest of Citation, whereby the State of Indiana agreed that "Tract Participations shall remain constant throughout the entire period during which this agreement remains in force and effect, *notwithstanding any subsequent shifts or changes in the course of the Wabash River.*" *Claimant's Response in Opposition to Citation Oil & Gas Corp.'s Motion for Summary Judgment, Exhibit 7, ¶ 5.1 (emphasis added).*

47. A clear reading of paragraph 5.1 of the Unit Agreement confirms that the paragraph sets forth the means of allocating royalties between Citation and its lessor and the State of Indiana "in accordance with the Tract Participations" that are "determined by the ratio which the surface area of the particular tract bears to the entire surface area of the Unit Area involved." *Id. ¶ 4.1 & 5.1.* Furthermore, the Unit Agreement expressly

states that Citation's and the State of Indiana's title to property are unaffected by its terms." *Id.* ¶ *2.2.*

48. While in the right case acquiescence by a property owner to the assertion of dominion and control by another person over property may result in the legal recognition of a different property boundary, such is not the case here. The term stated in the Unit Agreement upon which Locust Street relies, bears no relevance to the dominion or control of actual property and reflects nothing with respect to the title of property. The term's application is clearly limited to establishing a consistent and stable method of the dividing royalties.

Dated: July 22, 2014

Sandra L. Jensen
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
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BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

IN THE MATTER OF:	)	
	)	
LOCUST STREET COMPANY, INC.,	)	**Administrative Cause**
Claimant,	)	**Number: 13-101G**
	)	
v.	)	
	)	
CITATION OIL & GAS CORP., and,	)	**Permit #54797**
DEPARTMENT OF NATURAL RESOURCES,	)	
Respondents.	)	

IN THE MATTER OF:		
LOCUST STREET COMPANY, INC.,	)	**Administrative Cause**
Claimant,	)	**Number: 13-104G**
	)	
v.	)	
	)	
CITATION OIL & GAS CORP., and,	)	**Permit #54796**
DEPARTMENT OF NATURAL RESOURCES,	)	
Respondents.	)	

RESPONSE TO CLAIMANT'S OBJECTION TO FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER ON MOTION FOR SUMMARY JUDGMENT

COMES NOW, Respondent, Citation Oil & Gas Corp. ("Citation"), by the undersigned counsel, and hereby submits the following Response to Claimant's Objection to Findings of Fact and Conclusions of Law with Non-Final Order on Motion for Summary Judgment and, in support thereof, states as follows:

FACTS

1. On or about May 22, 2013, the Indiana Department of Natural Resources issued Permit #54796 for the Amanta Maier 29 E well, with a proposed location in the South Half of the

Southwest Quarter of the Southeast Quarter; and Permit #54797 the Amanta Maier 30 E well, with a proposed location in the North Half of the Northwest Quarter of the Southeast Quarter; all in Section 14, Township 3 South, Range 14 West, in Gibson County, Indiana.

2. On or about June 5, 2013, Claimant, Locust Street Company, Inc. ("Locust Street"), filed a Request for Administrative Review with the Division of Hearings of the Natural Resources Commission opposing issuance of the permits, alleging that Claimant is the true owner of all or a portion of the oil and gas underlying the drilling units for the proposed wells.

3. On or about November 21, 2013, Respondent, Citation, filed a Motion for Summary Judgment on the objection of Claim and alleging that it held the right to drill and produce the oil and gas through a valid leasehold interest, as ownership of the mineral estate resided in the lessor, Amanta Maier, and her successors in interest.

4. On or about December 31, 2013, Claimant, Locust Street, Responded to the Motion for Summary Judgment arguing, *inter alia*, that accretions of the Wabash River do not define the boundaries of mineral ownership due to an existing Unit Agreement dated November 28, 1984 between the State of Indiana and other parties, who are not interested in this proceeding.[1] Claimant argues that through the agreement and the continued allocation of oil and gas production proceeds, the State of Indiana acquiesced to a mineral ownership boundary in the area of the proposed wells which is independent of the accretions of the Wabash River.

5. On or about January 6, 2014, Respondent, Citation, filed its Reply Brief in Support of Motion for Summary Judgment addressing this and other arguments raised by Claimant.

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[1] The Unit Agreement is identified as Exhibits 7 and 8 of *Claimant's Response in Opposition to Citation Oil & Gas Corp.'s Motion for Summary Judgment.*

6. On or about June 27, 2014, the Administrative Law Judge ("ALJ") issued her Findings of Fact and Conclusions of Law finding in favor of Respondent and affirming issuance of the oil and gas permits.

7. On or about July 14, 2014, Claimant Locust Street filed an Objection to Findings of Fact and Conclusions of Law with Non-Final Order on Motion for Summary Judgment arguing that the ALJ did not adequately address Claimant's arguments regarding acquiescence and that the dispute represented a material issue of fact for which disposition on Summary Judgment was not appropriate.[2]

8. On or about July 22, 2014, the ALJ issued a Submission of Possible Revision for Consideration by the AOPA Committee of the Natural Resources Commission proposing the addition of four paragraphs to the Findings of Fact and Conclusions of Law previously issued by the ALJ.

STANDARD

Under 312 IAC 3-1-10, an administrative law judge may apply the Indiana Rules of Trial Procedure in this proceeding so long as these rules are not inconsistent with I.C. 4-21.5. Indiana Trial Rule 56 governs summary judgment and provides that judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(c). For the purposes of summary judgment, "[a] fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth." *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009).

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[2] Claimant's argument set forth in its Response in Opposition to Citation Oil & Gas Corp.'s Motion for Summary Judgment dated December 31 (in pages 7 through 9), and reprised in the Objection, is only asserted to apply to the Amanta Maier #30E (Permit #54797). Claimant's objection and acquiescence argument does not pertain to the Amanta Maier #29E (Permit #54796), and such permit should be excluded from any relief which may be granted to Claimant.

Additionally, "construction of a written contract is a question of law." *Carroll Creek Development Co., Inc. v. Town of Huntertown*, 9 N.E.2d 702, 709 (Ind.App. 2014). "Oil and gas leases are contractual in nature and will be interpreted under contract law. To that end, when an oil and gas lease is unambiguous, it will be interpreted and enforced according to the plain meaning of its terms." *Meisler v. Gull Oil, Inc.*, 848 N.E.2d 1112, 1114 (Ind.App.2006) (internal citations omitted). "Summary judgment is especially appropriate in the context of contract interpretation because the construction of a written contract is a question of law." *TW Gen. Contracting Servs. Inc. v. First Farmers Bank & Trust*, 904 N.E.2d 1285, 1287 (Ind.App.2009) (citing *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind.1997).

Paragraphs 32 through 34 of the Order squarely addressed the issue of the location of the state line as to this particular matter after hearing all the arguments in this case, and the ALJ further provided that, while it is not making a general ruling on the location of the state line, it is limiting its current ruling to support the Department of Natural Resources' interpretation of the state line in this particular matter.

ARGUMENT

I. The ALJ properly addresses Claimant's arguments regarding acquiescence in its initial ruling.

With regard to Amanta Maier #30E (Permit #54797), Claimant does not assert that the ALJ failed to properly consider the factual findings, but rather the ALJ failed to properly consider a theory of law. In essence, Claimant argues that its theory of acquiescence was not addressed in the Order and the nature of this claim precludes application of summary judgment. As detailed below, the Order did not invoke the specific term "acquiescence," however, it is not necessary to re-reiterate every single reference or statement presented in the underlying hearing

in this matter. As extensively examined in several instances in this matter, including the hearing before the ALJ, Claimant's assertions that a state line may be moved by acquiescence is simply not supported by current federal or state law. Paragraphs 32 through 34 of the Order squarely addressed the issue of the location of the state line as to this particular matter after hearing all the arguments in this case, and the ALJ further provided that, while it is not making a general ruling on the location of the state line, it is limiting its current ruling to support the Department of Natural Resources' interpretation of the state line in this particular matter. As the acquiescence claim necessarily affects the ownership interests of the State of Indiana and the location of the Indiana and Illinois border, the claim was disposed of in the following portions of the Order, *to-wit*:

> 32. Therefore, just as this analysis requires a determination as to the property interests of Locust Street and Citation's lessor in light of the meanderings of the Wabash River over time, the State of Indiana's property interests must also be considered.
>
> 33. Furthermore, it is noted that the State of Indiana's western boundary with Illinois is identified as:
>
> > ...a line drawn along the middle of the Wabash from its mouth, to a point, where a due north line drawn from the town of Vincennes, would last touch the north western shore of said river...
>
> *31 Acts Passed at the First Session of the Fourteenth Congress of the United States; 59-61; U.S. Statutes at Large, III, 289-291; Kettleborough (ed.), Constitution Making in Indiana, I, 73-77; Carter (ed.), Territorial Papers, VIII, 404-408.*
>
> 34. The Department correctly notes that a determination of the boundary between the State of Indiana and the State of Illinois is a matter within the original and exclusive jurisdiction of the [United States Supreme] Court." *Ohio v. Kentucky*, 410 U.S. 641 (1973). The content of the instant order shall be restricted in application to the matter at hand and in no respect be viewed as a commentary with respect to any determination of the location of the Indiana - Illinois State boundary.

Claimant asserts that the State of Indiana has modified its border by agreement with private parties. There is no avenue to grant relief to Claimant under its claim of acquiescence without alteration of this border. To allow otherwise would allow private parties to modify the state lines through private agreements or actions. The ALJ rejected the theory that parties may unilaterally modify state lines by acquiesce by holding that this boundary is determined by an Act of the United States Congress which can only be reviewed by application to the United States Supreme Court. Claims of Claimant relying upon acquiescence are therefore preempted, and further disposition of the claim would be redundant and unnecessary to the findings, conclusions or relief granted by the Order.

II. The ALJ's Submission for Possible Revision for Consideration by the AOPA Committee of the Natural Resources Commission properly addresses Claimant's arguments regarding acquiescence.

Assuming the ALJ did not address the specific argument set forth by Claimant, in the ALJ's Submission of Possible Revision for Consideration by the AOPA Committee of the Natural Resources Commission she introduced four new paragraphs which more directly addressed the Claimant's argument of acquiescence. New paragraph 47 states "[t]he Unit Agreement expressly states that Citation's and the State of Indiana's title to property are unaffected by its terms." New paragraph 48 adds, "[t]he term stated in the Unit Agreement upon which Locust Street relies, bears no relevance to the dominion or control of actual property and reflects nothing with respect to the title of property." The Unit Agreement's terms, and continuous production under that agreement, form the only basis for Claimant's acquiescence theory. The ALJ completely disposed of that argument by properly construing the Unit Agreement. Claimant's Objection to Findings of Fact and Conclusions of Law with Non-Final Order on Motion for Summary Judgment is, therefore, now moot.

III. The ALJ's supplemental findings are correct and should be adopted by the AOPA Committee of the Natural Resources Commission.

Under Indiana law, acquiescence may apply to modify real estate boundaries where:

> Two adjoining property owners (1) share a good-faith belief concerning the location of the common boundary line that separates their properties and (2) although the agreed-upon location is not in fact the actual boundary, (3) use their properties as if that boundary was the actual boundary (4) for a period of at least twenty years.

Kwolek v. Swickard, 944 N.E.2d 564 (Ind.Ct.App. 2011).

Although the doctrine of acquiescence appears to constitute mostly factual questions, Claimant's theory solely relies upon the effect of a Unit Agreement to establish these elements. As a matter of law, the Unit Agreement does not satisfy these elements. The Unit Agreement relied upon by Claimant in its Objection specifically disclaims any effects on ownership of the minerals. Paragraph 2.2 of the Unit Agreement provides:

> 2.2 Titles Unaffected by Unitization. Nothing herein shall be construed to result in the transfer of any title by STATE or by LESSEES to each other or to any other person whatsoever; the intention of this Agreement being to provide for the cooperative development and operation of the several tracts and for the sharing of the Unitized Substances produced and saved as herein provided.

By its plain terms, the Unit Agreement does not represent an agreement to fix a boundary or affect fee title in any way. Claimant has made no attempt to distinguish this clear language found within the Unit Agreement; has not asserted the Unit Agreement is ambiguous in any way; nor has Claimant argued such a disclaimer is invalid. The entirety of Claimant's argument rests upon this agreement and its operation. Therefore, determining the effects of this agreement on title to the minerals completely disposes of the issue.

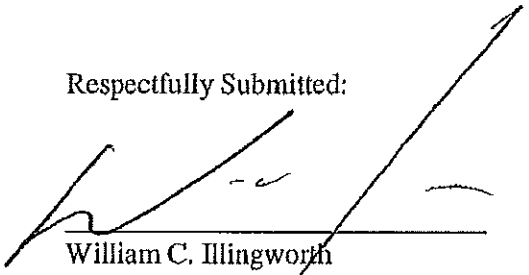
IV. There are no genuine issues of material fact and disposition on summary judgment is proper.

"A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth." *Williams v. Tharp, supra.* Although Claimant wishes to frame its argument as a genuine issue of material fact, the alleged dispute is not "genuine." There are no differing accounts of truth to be resolved. Respondent, Citation, does not dispute that such a Unit Agreement exists or that production occurred under the agreement. Construction of the agreement in favor of Respondent, Citation, a construction which Claimant has nowhere disputed, properly disposes of this claim on summary judgment. Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(c).

CONCLUSION

Summary judgment in favor of Respondent, Citation, is appropriate and the AOPA Committee of the Natural Resources Commission should adopt all findings and conclusions of the ALJ. Insofar as Claimant's Objection asserted its legal theory was unaddressed in the original findings, that assertion has now been addressed and correctly resolved by the ALJ. Insofar as Claimant continues to assert there are genuine issues of material fact, Claimant is in error. Claimant's theory is founded upon the operation and interpretation of a written contract which is clearly an issue to be resolved on summary judgment in favor of Respondent, Citation. Since there are no genuine issues of material fact, the Order should not be dissolved, and remand is inappropriate.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the following document:

RESPONSE TO CLAIMANT'S OBJECTION TO FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER ON MOTION FOR SUMMARY JUDGMENT

was deposited in the United States Mail in Evansville, Indiana, on the 22nd day of August, 2014.

Postage was fully prepaid and addressed to the following:

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